

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ROBERT SIMPSON,

Defendant-Appellant.

UNPUBLISHED

September 30, 2003

No. 240350

Wayne Circuit Court

LC No. 01-010433

Before: Owens, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of one count of assault with intent to commit armed robbery, MCL 750.89, for which he was sentenced to 15 to 50 years' imprisonment. We affirm in part, reverse in part, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant challenges the sufficiency of the evidence supporting his conviction. A challenge to the sufficiency of the evidence in a bench trial requires us to "view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000).

Here, defendant was convicted of aiding and abetting an assault with intent to commit armed robbery. In *People v Tanner*, 255 Mich App 369, 418-419; 660 NW2d 746 (2003), we explained:

To support a finding that defendant aided and abetted . . . the prosecution must show that (1) the crime charged was committed by defendant or some other person, (2) defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that he gave aid and encouragement.

The elements of assault with intent to commit armed robbery are: "1) an assault with force and violence; 2) an intent to rob and steal; and 3) defendant's being armed." *People v Federico*, 146 Mich App 776, 790; 381 NW2d 819 (1985). York's testimony established that Simon attempted to enter his house, and, in the process, Simon shot York. Further, defendant's statement

indicates that Simon intended to rob York for the purpose of stealing money and marijuana. Accordingly, there is no question that Simon assaulted York with the intent to commit armed robbery.

Instead, defendant contends that the evidence was insufficient to establish that he “performed acts or gave encouragement that assisted the commission of the crime.” *Tanner, supra* at 418-419. However, we agree with the trial court’s finding that defendant assisted in the commission of the crime by showing Simon where York resided and acting as a lookout. As further proof of defendant’s participation in the crime, we note his hope to receive some of the proceeds of the armed robbery. Finally, defendant’s statement indicated that Simon stated early in the day his plan to rob York. Thus, when defendant assisted Simon, defendant knew Simon’s intent. See *Tanner, supra* at 418-419. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *Nunez, supra* at 615. Accordingly, we reject defendant’s challenge to the sufficiency of the evidence supporting his conviction. *Id.*

Next, defendant contends that he was deprived of his constitutional right to effective assistance of counsel. Specifically, defendant contends that his trial counsel should have moved to suppress his statement because it was involuntary. A successful claim of ineffective assistance of counsel requires a defendant to “show that counsel’s performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant.” *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000).

Here, during the *Ginther*¹ hearing, defendant testified that he told his trial counsel that he was “high on heroin” at the time of the statement. Defendant’s trial counsel, however, testified that he specifically asked defendant whether defendant was under the influence of “anything” at the time of the statement. Trial counsel testified that defendant said “no.” The trial court found defendant’s trial counsel to be the more credible witness. A trial court’s “resolution of a factual issue is entitled to deference,” especially where it “involves the credibility of witnesses whose testimony is in conflict.” *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). Regardless, having reviewed the hearing transcript, we are not persuaded that the trial court erred in finding defendant’s trial counsel to be the more credible witness. Accepting trial counsel’s testimony as true, defendant never informed trial counsel that he was on heroin at the time of the statement. Consequently, defendant’s trial counsel was not ineffective for failing to move to suppress defendant’s statement. *Snider, supra* at 423-424.

Finally, defendant challenges the scoring of several offense variables. Generally, the “sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Thus, “[s]coring decisions for which there is any evidence in support will be upheld.” *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

The first offense variable that defendant challenges is OV-1, which was scored at twenty-five points. MCL 777.31(1)(a) provides that twenty-five points should be scored where a firearm was discharged at or toward a victim. Here, the evidence plainly indicated that Simon discharged a firearm at York. Defendant testified that he knew that Simon had a gun and intended to rob York. Accordingly, on an aiding and abetting theory, there was sufficient evidence to prevent a finding that the trial court erred in scoring this variable at twenty-five points. *Hornsby, supra*.

Defendant also contends that the trial court improperly scored OV-2 at five points. We note, however, that the record indicates that the trial court scored this variable at zero points. Accordingly, defendant's contention of error is misplaced.

Next, defendant challenges the scoring of OV-4 at ten points. MCL 777.34 provides that ten points may be scored where a victim suffers a serious psychological injury that may require professional treatment. In scoring this variable, the trial court ruled:

You're on your porch with your wife, your kids. Some guys come up there with a gun. You kids come running into the house, telling you there's a guy with a gun. You have to dodge down to protect yourself, or you get shot; and you have to kill the intruder coming into your home. And you don't think that's psychological damage to any of the victims, including the kids who were there?

I think that is not a reasonable interpretation. He gets ten points for the psychological injury.

On appeal, defendant argues that there was no evidence in the record to support the trial court's speculation that someone suffered a psychological injury.

We note, however, that York's girlfriend's mother described the impact that the incident had on the children. She also suggested that York and her daughter had to move because of the mental impact on the incident. To be sure, her statement came after the trial court had scored OV-4 at ten points. But this statement was sufficient to render any error in the trial court's scoring of this variable harmless. Accordingly, we reject defendant's contention of error.

Finally, defendant contends that the trial court erred in scoring OV-3 at twenty-five points. MCL 777.33(1)(c) provides that twenty-five points should be scored for OV-3 where the victim suffers a "[l]ife threatening or permanent incapacitating injury." Here, the prosecution concedes that there was no evidence supporting this scoring. We agree. But the prosecution argues that there was evidence supporting a scoring of this variable at ten points. Indeed, ten points are scored where the victim suffers an injury "requiring medical treatment." MCL 777.33(1)(d). In light of the evidence that York was shot in the shoulder, this variable should have been scored at ten points. Accordingly, we remand for resentencing in light of the revised guidelines range.²

² The prosecution contends that any error in scoring OV-3 was harmless because defendant's
(continued...)

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter

(...continued)

revised sentencing range would have been 108 to 180 months' imprisonment. Indeed, defendant's minimum sentence of fifteen years' imprisonment still falls within that sentencing range. The prosecution, however, fails to cite any authority in support of that assertion.

On the one hand, MCL 769.34(10) requires us to affirm any sentence within the appropriate sentencing guidelines range. On the other hand, MCL 769.34(10) allows us to remand where, as here, there is a scoring error. Our Supreme Court has ruled that a remand for resentencing is unnecessary where the trial court's remarks indicate that it would have imposed the same sentence, regardless of the incorrect scoring of a variable. *People v Mutchie*, 468 Mich 50, 51; 658 NW2d 154 (2003). Here, although the trial court expressed displeasure over the incident, there is no indication that the trial court would have imposed the same sentence, regardless of the appropriate sentencing range. Thus, we conclude that it is appropriate to remand for resentencing.